

2/10/97

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOAQUIN ALVARADO,

Petitioner,

v.

THE SUPERIOR COURT,

Respondent;

THE PEOPLE,

Real Party in Interest.

B103406

(Super. Ct. No. BA 099774)

(Robert J. Perry, Judge)

JORGE LOPEZ,

Petitioner,

v.

THE SUPERIOR COURT,

Respondent;

THE PEOPLE,

Real Party in Interest.

B103561

(Super. Ct. No. BA 099774)

(Robert J. Perry, Judge)

ORIGINAL PROCEEDINGS; petitions for writ of mandate. Denied.

Klein & Crain and Michael M. Crain; Richard H. Millard, Tara Selver and Robert S. Gerstein for Petitioners.

No appearance for Respondent.

Gil Garcetti, District Attorney, Brent Riggs and Brentford J. Ferreira, Deputy District Attorneys, for Real Party in Interest.

How far will the justice system go to try to protect the life of a witness who has been threatened with death? In this murder prosecution, the trial court determined that the defense would be denied discovery of the identities of three witnesses, and rejected the defense's request for photographs of the witnesses. We conclude the trial court was correct, even though the witnesses are crucial to the prosecution's case and one of the two defendants has not been linked to the death threats. The defense has been provided all other discovery concerning the witnesses, including their grand jury testimony, criminal histories, and gang nicknames. The witnesses will be produced before trial for interviews. They will testify at trial in the presence of the defendants, without disguises.

We agree with defendants that this limitation on discovery will significantly hamper their defense efforts, and we analyze the issue from that perspective. But we determine that when a witness' life is at stake, an appropriate balance can be struck, with the judicial system doing its best to assure a defendant a fair trial under the circumstances while at the same time endeavoring to protect the witness.

Our dissenting colleague has chosen to elevate procedure over the witnesses' welfare. We decline to adopt a position which purports to determine that the lives of some witnesses are more valuable than those of others. We reject the fortuity of saying to one witness that we will protect him because he is peripheral while turning our backs on another because he is central. We find illogical the premise that pure happenstance determines whether we will endeavor to protect one person (e.g., the peripheral witness or the witness whose death threats can be tied to a defendant) and

abandon another person (e.g., the crucial witness or one whose death threats cannot be tied to a defendant). We do not purport to arrogate unto ourselves the power to place relative values on the lives of threatened witnesses.

Our analysis leads us to conclude that the crucial factor to be determined by the trial court is whether a witness has been threatened and is actually in mortal danger. Once a trial court has so determined on the basis of sufficient evidence, it is not an abuse of discretion to deny to the defense photographs of the witness or the witness' true name.

We do not reach the question of whether, under such circumstances, it would be an abuse to give the defense such information. We leave resolution of that issue to another time and another case. Nor do we reach the question of whether a trial court may deny to the defense more than a photograph and the witness' true name. We confine ourselves to the circumstances before us.¹

FACTS AND PROCEDURAL HISTORY

Defendants Joaquin Alvarado and Jorge Lopez are charged with murdering Jose Uribe. The murder occurred in Los Angeles County Jail while all three men were inmates. According to the evidence before the trial court, the Mexican Mafia prison gang ordered Uribe killed because he was an informant or "snitch." Alvarado

¹ Because we uphold the permanent nondisclosure of the names and photographs, both before and during trial, we need not address the propriety of withholding the information beforehand, but disclosing it during trial. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51-54 [cf. conc. opn. of Blackmun, J., *id.* at pp. 61-65, and dis. opn. of Brennan, J., *id.* at pp. 66-72]; *People v. Marshall* (1996) 13 Cal.4th 799, 841; *People v. Webb* (1993) 6 Cal.4th 494, 517-518.)

and Lopez are not Mexican Mafia members, but murdered Uribe to curry favor with, and perhaps gain membership in, the gang. Three other jail inmates were the only eyewitnesses to the murder.

Uribe was murdered on February 6, 1993. He was beaten and stabbed 37 times with a contraband prison knife known as a shank. A complaint charging Alvarado, Lopez, and Frank Marquez with Uribe's murder was filed on August 13, 1993.² The prosecution provided discovery to the defense from which identifying information for its three crucial witnesses was deleted. The magistrate ordered that information disclosed to the defense eight weeks before the preliminary hearing.

Instead, the prosecution took the case to the grand jury, which returned an indictment on August 23, 1994. Alvarado is charged with murder with the special circumstance that he previously committed another murder, and conspiracy to commit murder. The prosecution is seeking the death penalty against Alvarado. Lopez is charged with murder, conspiracy to commit murder, and possessing a shank while in custody on three other occasions unrelated to this case. The prosecution provided defendants with transcripts of the grand jury proceedings. In those transcripts, the three inmate eyewitnesses are identified only as witnesses 1, 2, and 3.

According to the transcript, Uribe was housed in cell 10 of a particular jail module and row. When Uribe was murdered, the cells on that row generally housed eight inmates. Uribe was murdered in his cell during a noon lunch period.

² Marquez is not a party to this proceeding.

Witness 2 told the grand jury that, on the morning of Uribe's murder, Marquez, a jail trustee, came to cell 11 where witness 2 was housed. Marquez spoke to some of witness 2's cellmates in Spanish. Although witness 2 is not Hispanic, he understood some Spanish and believed Marquez said a snitch was going to be dealt with and they should stay away from cell 10. About ten minutes later, witness 2 heard a black trustee tell some black inmates to stay away from the end of the row where cell 10 was located. Based on these statements and other inmates' actions, witness 2 knew no one was to go near cell 10. Nonetheless, witness 2 stayed alone in his cell around noon instead of going to lunch because he wanted to eat food he had bought that morning at the commissary.

Around noon, witness 2 saw Alvarado and Lopez, who were not assigned to cell 10, enter that cell with another inmate who was housed there. Witness 2 then heard a fight inside cell 10 and words about being a snitch. Other inmates made noise to drown Uribe's cries. When other inmates returned from lunch, witness 2 saw Lopez give his bloody shirt to Marquez outside cell 10. Witness 2 also saw a bloody body under a bed inside cell 10. Marquez told witness 2 to return to his cell because the matter did not involve him. Witness 2 knew Lopez and Marquez from earlier contact.

Two days after the murder, witness 2 was shown photos of inmates who had been in the area. Witness 2 identified Lopez, Marquez, and a third inmate as the second person who entered cell 10 with Lopez. Alvarado's picture was not in the group. Later, witness 2 identified Alvarado's picture as the second man who

accompanied Lopez, and said his earlier identification of the third inmate was mistaken.

Witness 1 testified that on the day of the murders he was housed in cell 12. Although also not Hispanic, witness 1 understood some Spanish. Witness 1 heard Marquez ask one of his Hispanic cell mates for some extra jail clothing and say something about a snitch. Witness 1 gave Marquez his shirt, hoping to curry favor with Hispanic inmates. Witness 1 stayed alone in his cell during lunch because he was tired and felt like sleeping. Witness 1 saw a group of five inmates, including Alvarado and Lopez, near his cell. He then heard a fight, but no covering noise, and saw the same group of five inmates leave the area.

Witness 1 identified Marquez' photo two days after the murder, but six months later identified someone else as the trustee to whom he gave his shirt. Witness 1 told the grand jury Alvarado and Lopez were in the group of five inmates he saw near his cell, although he admitted confusion regarding his earlier identification of their photos. Witness 1 also testified that the day before his testimony, he was put into the same jail cell as Alvarado, who threatened to harm him if he testified.

Witness 3, a jail trustee like Marquez, testified he was assigned to sweep the module containing cells 10-12. On the morning of the murder, witness 3 saw Marquez wrap a shank inside a shirt and give it to another Hispanic inmate. After lunch, witness 3 saw Marquez take a shirt from someone on the same row.

The prosecution provided the defense with the grand jury transcripts and all other information about the case and the witnesses, including their criminal histories

and any known gang nicknames, except the names and photographs of witnesses 1-3. The defense continued to seek the witnesses' true names and photographs. Although the prosecution is required to disclose, thirty days before trial, the names and addresses of all witnesses to be called at trial (Pen. Code, §§ 1054.1, subd. (a); 1054.7),³ the prosecution sought a protective order permitting the permanent nondisclosure of the identities and photographs of witnesses 1-3 because such disclosure to defendants or their attorneys would place the witnesses' lives in danger. (§ 1054.7.)

Over defendants' objections, the trial court held a series of in camera hearings, from which the defense was excluded, to permit the prosecution to demonstrate good cause why disclosure of witnesses 1-3's names and photos should be denied. These hearings were authorized by section 1054.7, which provides in relevant part: "The disclosure required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding[.]. If the court enters an order granting relief following

³ Unless otherwise noted, all further section references are to the Penal Code.

a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. . . .”

Based on the evidence produced at these hearings, the trial court made the following factual findings: (1) The Mexican Mafia ordered Uribe’s murder. Uribe was killed only a day or two after arriving in the jail, and the orchestrated attack reinforces the conclusion that organized criminals caused his death. Alvarado and Lopez are not Mexican Mafia members but committed the murder to curry favor with the gang. (2) The Mexican Mafia is infamous for retaliating against informants. From 1988 to 1991, the gang ordered twelve completed or attempted murders of inmates, including those in protective custody or in custody in other states. The gang also was linked to five additional murders of people not in custody. (3) The Mexican Mafia can obtain confidential information about people both in and out of custody through an extensive intelligence network, including sources inside many public agencies. The gang’s penetration of penal institutions is so great it is considered by some to be in de facto control of them. The gang has ordered so many murders and there are so many witnesses in protective custody that the state cannot adequately protect them all. (4) The Mexican Mafia requires documentation before an informant death contract will be approved. At least two members must approve the contract after an informal trial including review of transcripts indicating the person was an informant. This need for documentation demonstrates the importance of knowing the informant’s true name. (5) One of the witnesses was attacked and warned against

testifying by an inmate aligned with the Mexican Mafia. Alvarado threatened a witness while he was in protective custody. While one of the witnesses was in court, someone wrote on his cell wall that he was dead.

Based on these findings, the trial court concluded that good cause for permanent nondisclosure of the witnesses' true names and photos had been clearly established because their participation in the case placed them in serious danger which would be increased by disclosure of their names. The trial court acknowledged its ruling would preclude the defense from fully investigating the witnesses' background and history and would limit the effectiveness of the defense's cross-examination of the witnesses.

The trial court made the following order: 1) the names of the three witnesses will be permanently withheld from the defense; 2) the prosecution must produce the witnesses for interview by defense counsel thirty days before trial. The witnesses are not required to speak to defense counsel, but if they do, they may, but are not required to, disclose their names; 3) if defense counsel learn the witnesses' names, they may not disclose the names to defendants; and 4) at trial, the witnesses may, but are not required to, disclose their names, and their appearance will not be disguised.

Before trial, Alvarado and Lopez sought writ review of this order. We issued an order to show cause so we could review the order.

DISCUSSION

Alvarado and Lopez do not challenge the trial court’s finding that disclosure of the witnesses’ names will seriously increase their risk of death above what they already face. They do not claim the finding is unsupported by sufficient evidence, or is based on evidence produced at hearings from which they were excluded. Defendants also do not challenge the criminal discovery statutes under which the trial court operated. (§§ 1054-1054.7, enacted as part of Proposition 115 on June 5, 1990.) Rather, defendants argue that pretrial nondisclosure violates the Sixth Amendment confrontation clause as made applicable to the states through the Fourteenth Amendment Due Process clause, and that nondisclosure at trial violates the confrontation clause. Defendants argue this nondisclosure significantly reduces the effectiveness of their investigation and resulting cross-examination of the witnesses.

“The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution ‘to be confronted with the witnesses against him.’ This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas* [1965] 380 U.S. 400[, 401, 403] []. Confrontation means more than being allowed to confront the witness physically. ‘Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.’ [Citation.]” (*Davis v. Alaska* (1974) 415 U.S. 308, 315.) The *Davis* majority reversed a criminal conviction in which the defendant was precluded from cross-examining a crucial prosecution witness about his status as a juvenile probationer at the time of the crime and at trial. The defendant argued the witness’

probationary status may have caused him to fear the police would suspect him of the crime and resulted in distorted or false testimony through a desire to gain favor with the authorities. The trial court precluded the questions because a state statute guaranteed the privacy of juvenile records. The *Davis* court found the permitted cross-examination insufficiently effective (*id.* at pp. 317-318), and the witnesses' privacy right to avoid embarrassment outweighed by the defendant's right to effective cross-examination (*id.* at pp. 319-320.) The *Davis* court's analysis emphasized the witness' denial of any anxiety when confronted by the police, and concluded the witness might have answered differently had his probationary status been exposed. (*Id.* at pp. 311-314.) There was no claim the denied cross-examination would expose the witness to any danger beyond embarrassment.

In *Smith v. Illinois* (1968) 390 U.S. 129, the majority reversed Smith's conviction for selling drugs to a police informant. The alleged sale occurred in a restaurant, and only Smith and the informant testified to what happened. Police officers testified the informant entered the bar with marked money and no drugs, and left with drugs and no money. The officers found one of the marked bills on Smith during his arrest. Smith claimed he directed the informant to someone else in the restaurant who must have sold him the drugs, and must have gotten the marked bill as change when he bought coffee. On cross-examination, the informant admitted the name under which he testified was false. The trial court sustained the prosecution's unspecified objection to the defendant's inquiry regarding the informant's true name. The *Smith* court found the limitation on cross-examination violated Smith's

confrontation right. There was no showing the inquiry would have in any way endangered the witness. Indeed, two concurring justices noted “that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. [We] would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason [we] join the Court’s judgment and its opinion which, as [we] understand it, is not inconsistent with these views.” (*Id.* at pp. 133-134 (conc. opn. of White, J.), emphasis added.)

The *Smith* court relied on its earlier opinion in *Alford v. United States* (1931) 282 U.S. 687, 691-694. The *Alford* court likewise reversed a conviction where the trial court precluded Alford from asking a crucial prosecution witness his address. Again, there was no showing the inquiry would in any way endanger the witness.

“Where, however, there is a showing that disclosure would endanger the personal safety of the witness, the court has discretion to deny disclosure of the information. [Citations.]” (*People v. Watson* (1983) 146 Cal.App.3d 12, 20.) In *Watson*, the preliminary hearing magistrate precluded the defendant from asking a crucial prosecution witness the witness’ address when the prosecutor presented

evidence that answering would place the witness in danger. The trial court dismissed the case. (§ 995.) The appellate court reversed because, although the prosecution failed to meet its burden of showing danger to the witness, the defendant was not prejudiced because the witness was otherwise adequately impeached.

Likewise, *Montez v. Superior Court* (1992) 5 Cal.App.4th 763 upheld nondisclosure of crucial witnesses' addresses and telephone numbers because "the prosecution made a showing of sufficient danger of threats or harm to the witnesses, and the defense did not plausibly allege that the witnesses' veracity in their community was at issue." (*Id.* at p. 764.) Moreover, in *Montez* the adequate showing of danger involved "'harass[ment]'" of a witness and his family, seeing the defendant's associates in court, and being fearful. (*Id.* at p. 771.) That showing, found sufficient in *Montez*, pales next to the actual threats and attacks against these witnesses and the evidence of the Mexican Mafia's organized and successful policy of murdering those who give evidence against it.

In *People v. Castro* (1979) 99 Cal.App.3d 191, the court affirmed the conviction and held the trial court properly denied disclosure of a crucial witness' address, both because of numerous threats against the witness and because the witness was adequately impeached. (*Id.* at pp. 200-204.) The court in *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 384-387 applied the same test and ordered a case dismissed where the preliminary hearing magistrate had denied disclosure of a crucial witness' address. The court so held because the prosecution provided no

evidence of potential witness danger other than a conclusory claim that disclosure would subject the witness to harassment.

Only one case rejected this balancing approach, and its supporting United States Supreme Court authority. In *People v. Brandow* (1970) 12 Cal.App.3d 749, the primary witness against the defendant, who was charged with pandering, was an admitted former prostitute who was permitted to testify under an assumed name. The trial court did so because the prosecution presented what the *Brandow* court described as “extensive evidence that the witness’ life was in danger and that revealing her true identity or information from which it might be learned would unduly enhance the danger.” (*Id.* at p. 754.) The appellate court noted that the right to disclosure can give way to a proper showing of actual witness danger and did not challenge the showing made. Without citation to authority, the court simply concluded that, where there is not sufficient independent evidence of guilt, and the case turns on the competing credibility of the witness and the defendant, no balancing of interests was possible, and the witness’ identity must be disclosed to guarantee the defendant a fair trial. We reject this opinion because it failed to follow the authorities it cited, which support nondisclosure where, as in *Brandow*, an admittedly adequate showing of actual witness danger is made. As discussed in more detail below, we also reject its assumption that witnesses must be exposed to serious death threats by permitting no limits on cross-examination.

Federal cases are in accord. While some uphold limitations because the witnesses were of marginal importance, many involve important witnesses, and all

apply the balancing test used here: the more important the witness, the greater must be the showing of witness danger, and the more narrowly drawn the limits on disclosure, to justify nondisclosure. All these cases upheld limitations on cross-examination and disclosure of various identifying information. (*Clark v. Ricketts* (9th Cir. 1991) 958 F.2d 851, 854-855; *United States v. Varella* (11th Cir. 1982) 692 F.2d 1352, 1355-1356; *United States v. Rangel* (9th Cir. 1976) 534 F.2d 147, 148; *United States v. Cosby* (9th Cir. 1974) 500 F.2d 405, 407; *United States v. Ellis* (9th Cir. 1972) 468 F.2d 638, 639; *United States v. Jordan* (4th Cir. 1972) 466 F.2d 99, 102; *United States ex rel. Abbott v. Twomey* (7th Cir. 1972) 460 F.2d 400, 401-402.)⁴

We now apply these rules to the facts before us. First, we reject the People’s argument that, given the extensive discovery already provided, permanent non-disclosure of the witnesses’ names does not seriously limit defendants’ effective investigation and cross-examination of the witnesses. Defendants will have difficulty obtaining complete information about the witnesses’ location and ability to observe and testify about the crime. Moreover, defendants will be unable to obtain complete

⁴ The dissent’s attempts to distinguish these cases ignore that the only cases rejecting discovery limits where there is a valid finding of witness danger are *Brandow* and the dissent. The dissent’s “rule” is that witness danger is irrelevant unless any proposed discovery limitation relates to trivial information. Only then, under the dissent’s rule, would potential witness danger even be considered. As discussed above, the actual rule is that “[w]here . . . there is a showing that disclosure would endanger the personal safety of the witness, the court has discretion to deny disclosure of the information. [Citations.]” (*People v. Watson, supra*, 146 Cal.App.3d at p. 20.) As discussed elsewhere in our opinion, the dissent attacks the sufficiency of the evidence supporting the trial court’s witness danger finding, and the procedures which produced it, despite the absence of such defense challenges. Apparently, although it does not say so, the dissent would hold the trial court abused its discretion on these facts in denying disclosure of the witnesses’ names and pictures.

impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges. These limitations are particularly important because the victim, defendants, and witnesses all are inmates, the witnesses are crucial to the prosecution, and their credibility or its lack may well determine the outcome. While, as discussed below, the information provided to the defense will permit much investigation and cross-examination, we agree with the defense that, in this case, permanent nondisclosure of the witnesses' names significantly impairs their confrontation and due process rights.

Second, we reject the People's argument, raised for the first time on appeal, that defendants waived their constitutional confrontation and due process rights by threatening the witnesses. This argument is based on cases in which the defendants made or orchestrated the threats. As discussed above, no evidence links Lopez to any of the threats. Thus, this argument does not apply to him. Alvarado, of course, personally threatened a witness. However, where credible, serious threats to kill crucial witnesses exist, and disclosure of their names would put them in mortal danger, we conclude the source of the threats does not affect whether to impose, or the extent of, limits on defense discovery. (See, among others, *U. S. v. Thai* (2d Cir. 1994) 29 F.3d 785, 814-815; *United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 630-633; *United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, 1353-1359.) While these cases may provide a separate rationale for upholding discovery limits against a

claim that they violate defendants' constitutional right to prepare or present effective cross-examination where the defendants utter or direct the threats, we do not rely on them here. In any event, the prosecution did not raise this issue in the trial court. Issues raised for the first time on appeal which were not argued in the trial court are waived. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 311-315, pp. 321-327.)

We recapitulate the salient facts. First, after conducting the in camera hearing contemplated by section 1054.7, the trial court found good cause for nondisclosure of the three witnesses' names clearly established because their participation placed them in serious danger and disclosure of their names would likely increase their danger.

Second, these undisputed findings are supported by extensive, detailed factual findings, including that Alvarado personally threatened and attacked one of the witnesses before his grand jury testimony; both of the other witnesses received specific threats designed to dissuade them from testifying; the Mexican Mafia contracted for Uribe's murder, and the defendants, although not Mexican Mafia members, committed the murder to gain favor, and perhaps membership in the gang, the Mexican Mafia thus being motivated to protect even nonmembers who do its bidding; the Mexican Mafia deliberately retaliates against informants through its extensive intelligence and informant network, and requires some evidence of their status as informants based on their true names; and the witnesses cannot be protected by protective custody placement.

Thus, our analysis is based on the following undisputed facts: 1) These witnesses are crucial, essential prosecution witnesses without whom the state has no

viable case. The witnesses cannot be labeled peripheral, cumulative, or minor. 2) Disclosure of the witnesses' true names and photographs unquestionably will significantly increase the likelihood that the witnesses will be killed.⁵

Third, we emphasize that the only information being denied to defendants is the witnesses' true names and photographs. Their criminal histories, including nicknames and gang monikers, if any, have been produced, with identifying information deleted. The witnesses will be produced for pretrial interviews with defense counsel, at which they may choose voluntarily to disclose their names. Of course, like other California criminal trial witnesses, they may refuse to be interviewed. Alvarado threatened witness 1 and thus obviously knows who he is, although Alvarado may not know his name. Nothing prevents Alvarado from sharing his information with his counsel and co-defendants. The other witnesses have been threatened and thus have been identified within the jail population. Moreover, the trial court's order specifically states the witnesses will testify in full view of defendants in open court, without visual or audio disguise.⁶ Thus, much information has been and will be provided to the defense, enabling them to investigate the

⁵ Defendants did not challenge, on any ground, the sufficiency or accuracy of this evidence and the resulting findings or the procedures which produced them. Thus, we neither address nor determine the standard of proof the prosecution must meet to demonstrate witness danger. Likewise, we neither address nor determine the adequacy of the procedures under which the trial court operated. (§§ 1054, subd. (d); 1054.2; 1054.7.)

⁶ We offer no opinion as to how the trial court should rule should either defendant seek a continuance after the witnesses have finished testifying at trial to conduct further investigation based on the witnesses' appearance and testimony.

witnesses and conduct cross-examination. This information will help defendants give the jury a more complete picture of the witnesses. Only some information is being withheld, and that only on an uncontested showing that the nondisclosed information, above that already provided, will place the witnesses in mortal danger. This limited nondisclosure, in the face of such a proven and potentially lethal threat of witness danger, satisfies the careful balancing of interests required by the Constitution.

The defendants' constitutional rights are not absolute, and must be balanced with other fundamental interests. No one seriously disputes that society's ability to protect those who witness crimes and give evidence and enforce its criminal sanctions against crimes like murder are such fundamental interests. Credible threats to kill crucial prosecution witnesses to major crimes seriously and adversely affect that interest in at least three ways. First, if successful before trial, these defendants, if culpable, would completely escape responsibility for Uribe's murder, which then would go unpunished. Second, these particular defendants and others contemplating crime would be emboldened to use such threats to insulate themselves from accountability for other crimes. Third, even if not successful until after trial, witnesses to other crimes would be cowed. The result would be injustice in particular cases, a significant increase in criminality and violence, and eventual victory for the forces of social disintegration and anarchy.

These are not speculative, theoretical concerns. Criminal gangs, including the Mexican Mafia, have infiltrated not only prisons but the entire law enforcement and prosecutorial apparatus. They control criminal activity in the prisons and jails, and

drug trafficking both in and out of the prison system. The trial court's similar findings are supported by the undisputed evidence before us. Recent newspaper articles describe the current federal RICO and conspiracy trial of several Mexican Mafia leaders, gang control of drug trafficking, extortion, and murder, and society's increasing inability to control crime, through lowered arrest, charging, and conviction rates, and the increasing use of witness intimidation to further the power and unaccountability of individual and organized criminals. (Rohrlich & Tulskey, *Gang Killings Exceed 40% of L.A. Slayings: Intimidation of witnesses allows hundreds of suspects to walk free. Prosecutors try to break the cycle* , L.A. Times (Dec. 5, 1996) p. A1, col. 4; Russel, *La Eme: Murder, mayhem, and the Mexican Mafia: Can the Feds really cripple America's deadliest prison gang?* , L.A. New Times (Dec. 12-18, 1996) vol. 1, no. 17, p. 6; Rohrlich & Tulskey, *Efforts to Protect Witnesses Fall Short in L.A. County[.] Homicide: Proposals to strengthen the system go nowhere. People increasingly are too scared to testify* , L.A. Times (Dec. 23, 1996) p. A1; Krikorian, *Case of Teacher's Shooting Dropped After 2 Trials[.] Courts: Juries deadlocked both times. When a key witness softened his testimony, prosecutors implied there was intimidation from defendants' gang* , L.A. Times (Jan 28, 1997) p. B3; Ramos, *Witness Tells of His Life in Prison Gang[.] Trial: Star prosecution informant . . . describes his assaults for the Mexican Mafia* , L.A. Times (Jan 30, 1997) p. B1.)

These articles disclose the reality behind the issue before us. "More than a thousand gang killers are walking the streets of Los Angeles. [¶] Witness

intimidation helps keep them there. [¶] Witnesses have been killed and many more threatened, as frustrated police have been unable to protect them. [¶] Many residents of gang-dominated neighborhoods are too terrorized to come forward, and their reluctance feeds a deadly cycle. [¶] Without reliable witnesses, police and courts are powerless. More and more gang killers--responsible for about 40% of Los Angeles County's murders--remain free.” (Rohrlich & Tulsy, *Gang Killings Exceed 40% of L.A. Slayings*, *supra*, p. A1.)

“[L]aw enforcement officials say that not even the most secure prison cell in the state can squelch the influence of the Mexican Mafia--or, as it is more commonly known on the street, *la Eme*, the Spanish pronunciation of the letter *M*. For nearly four decades the clandestine organization, with an estimated 400 members and several hundred more associates inside and outside prison, has used fear and intimidation to control prostitution, gambling, narcotics smuggling, and extortion in California's prison system. [¶] . . . [¶] The archives of prison lore are full of examples of the organization's leaders managing to relay their often-deadly orders with relative ease, using corrupt guards as couriers, visitors and parolees to relay coded messages to the outside, and inmate transferees to communicate between prisons. (Sources say two guards at the federally operated Metropolitan Detention Center were fired after being suspected of smuggling heroin since the arrival there of the alleged Mafia leaders.) . . . [¶] Adding to their frustration, investigators say, is that relatives and girlfriends of Mafiosos are known to work within the court system in such agencies as the state Department of Motor Vehicles, giving *la Eme* the

potential to gather information about law enforcement officers, and prosecutors, among others. The organization even tries to infiltrate police ranks. For instance, a background check of a female applicant to the LAPD in November revealed her boyfriend to be a suspected Mafia associate.” (Russel, *La Eme, supra*, p. 8.)

“Two juries had deadlocked in favor of acquittal of Frazier Francis and Antonio Moses, both 19[, in their attempted murder trial for shooting a teacher through a school window during a retaliatory gang shooting]. In both cases the key witness--who had originally told police he saw one of the suspects fire a gun--softened his testimony. [¶] Both trials were laced with implications of gang intimidation of the witness After Monday’s court proceedings in Compton Superior Court, defendant Moses’ father talked bluntly about his belief that friends of his son had sent menacing signals to [the witness]. [¶] ‘He’s off the hook now,’ said A.C. Moses. During the first trial, the elder Moses had predicted to a reporter that [the witness] would ‘probably be iced’ if either defendant were convicted. [¶] ‘I know [the witness] is glad this is all over,’ Moses said from his home Monday. [¶] . . . [¶] On the witness stand in both trials, however, [after telling the police he saw Moses order Francis to shoot at the rival gang member, the witness] denied that he ever saw the shooting, saying he had only heard the shots. In response to prosecutors’ questions, he said he had heard he was ‘gonna get my head blown off’ if the suspects were convicted.” (Krikorian, *Case of Teacher’s Shooting Dropped After 2 Trials, supra*, p. B3.)

“Ernest ‘Chuco’ Castro . . . testified about his own criminal career, how he joined the [Mexican Mafia] prison gang, how he killed and assaulted others on the organization’s behalf and, ultimately, why he left La Eme, as the prison gang is called on the streets. [¶] . . . He left La Eme knowing that cooperating with authorities meant he was marked for death by the prison gang . . . [¶] . . . [¶] During stints at several California state prisons . . . Castro assaulted several members believed to be on La Eme’s hit list . . . He said he never questioned such an order. [¶] ‘Anyone who is on [the] La Eme hit list has to be stabbed,’ he said, adding that he agreed to commit the assaults ‘to get recognition from La Eme.’ [¶] . . . [¶] Castro, who was convicted and served time for voluntary manslaughter for one alleged Mexican Mafia-sanctioned hit, is in the federal witness protection program and is awaiting sentencing on state weapons charges.” (Ramos, *Witness Tells of His Life in Prison Gang*, L.A. Times (Jan 30, 1997) pp. B1, col. 6, B3, cols. 5-6.)

Our dissenting colleague dismisses the gang threat described in these articles and the evidence before the trial court as the “threat du jour.” (Dis. opn. of Masterson, J., *post*, at p. ____ [typed dis. opn., p. 7].) That death threats might represent a “threat du jour” is of small comfort to a witness whose identity is uncovered and who is subsequently hunted down and killed. The California Supreme Court apparently recognizes this threat as more than a “threat du jour,” approving severe restrictions on gang members’ association and movement rights as part of injunctions designed to reclaim whole neighborhoods essentially occupied by gangs. (*People ex rel. Gallo v. Acuna* (Jan. 30, 1997) __ Cal.4th ____ [S046980].)

Because its description and analysis of the problem are acutely relevant to our case, we quote from the opinion at some length. “Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as [gang] turf . . . , is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency -- openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents’ cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

“The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the

trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden." (*People ex rel. Gallo v. Acuna, supra*, __ Cal.4th at p. __ [slip opn., pp. 1-2], emphasis added.)⁷

Without doubt, the discovery limits in the instant case significantly and adversely affect defendants' constitutional rights. Likewise without doubt, the danger that crucial prosecution witnesses to a murder are far more likely to be killed, before or after testifying, if defendants are given this disputed information, significantly and adversely affects society's fundamental interests. Thus, this case

⁷ Without attempting to dispute the facts discussed in these articles and by our Supreme Court, and documented in the evidence heard by the trial court, or citing any contrary information, the dissent suggests the crime problem posed by criminal gangs, and specifically their use of witness intimidation and retaliation, is an illusory or transitory "threat du jour." (dis. opn. of Masterson, J., *post*, at p. __ [typed dis. opn., p. 7].) The thrust of this characterization is that, like earlier, presumed "unfounded" fears of anarchists or internal subversion, the gang problem is exaggerated, and thus should receive little or no weight in balancing society's interest in protecting witnesses and prosecutions against defendants' fair trial rights. We wonder if anyone intrigued by this suggestion would entertain it if the conditions described in these articles, the evidence before the trial court, and our Supreme Court in *People ex rel. Gallo v. Acuna, supra*, __ Cal.4th __, existed in his neighborhood or affected his family, neighbors, and co-workers. We think these conditions sufficiently real and verifiable, especially absent contrary information, to trump suggestions that our concern for witness safety is the product of overreacting, ideological rigidity, or paranoia. Recent events likewise disclose the reality behind similar threats by armed right-wing "militias" involving destruction of federal buildings and threats to judges and prosecutors as well as private citizens.

In any event, even if the problem of such death threats is "du jour" and thus merely transitory (which we do not concede), it would not change our result. Whether this problem will abate tomorrow or last forever is immaterial. As we have stated earlier, whenever a witness' life is at stake, we can strike an appropriate balance between trying to protect him and giving a defendant the best possible trial under the circumstances.

compels us to balance the defendants' constitutional fair trial and confrontation rights with society's and witnesses' fundamental rights to hold criminals responsible for their conduct through fair trials at which all percipient witnesses can testify without fear of death from criminal gangs. Under such circumstances, no authority compels the disclosure of these witnesses' true identities and photographs.

Defendants focus on a single point: Once the witness is crucial, no discovery limits are permitted. Ignoring the other crucial point, i.e., that in light of serious threats, without these limits the witnesses will be killed, regardless of the source of the threats, defendants do not even attempt to balance these fundamental interests, but simply subordinate society's fundamental interest to their own. The defendants ignore or, through innuendo, dismiss the amount of discovery they will receive. Under the defendants' analysis, it would not matter how great or small the discovery limitations were, if the witness is crucial. We think it matters that much discovery has been and will be produced, and that the witnesses will testify openly without hoods or voice distortion, although we do not suggest that such greater limitations might never be upheld, depending on the seriousness of the threat.

Courts routinely balance criminal defendants' constitutional rights against society's fundamental right to fair trials resulting in true verdicts based on full evidentiary records. Thus, otherwise voluntary statements taken from criminal defendants in violation of their Fifth Amendment privilege against self-incrimination (*Miranda v. Arizona* (1966) 384 U.S. 436), nonetheless may be admitted to impeach the defendants' contrary trial testimony. (*Harris v. New York* (1971) 401 U.S. 222,

226; *People v. May* (1988) 44 Cal.3d 309.) Unlike defendants and the *Brandow* court, we carefully balance these competing interests, as the cases instruct. We do not subordinate one to another.⁸

Moreover, while frequently giving lip service to the undisputed nature of our factual record and the lack of a challenge to the procedures which produced it, the defense, through innuendo, suggests these undisputed facts are unreliable. For example, they suggest that expenditure of greater funds would permit the witnesses to be protected if their identity were disclosed. Of course, there is no evidence that, given the Mexican Mafia's tentacles, even relocated witnesses would be safe. Further, how much would society have to spend to come as close as the defense requires to absolute witness protection? The defense suggests that, unless we can absolutely guarantee witness safety, our feeble efforts are wasted. If so, they conclude, since we cannot do everything, we cannot do anything.

The defense's analysis leads to the anomalous result that discovery limits may be placed on peripheral, but not crucial, witnesses. Put another way, the defense says

⁸ The dissent's footnote 2, while essentially conceding that individual constitutional rights can be balanced against fundamental societal interests, suggests that such communal rights have no constitutional basis. Without explaining why, the dissent concludes that the People's California Constitutional due process right (Cal. Const., art. I, § 29) does not provide such support, despite the dissent's reliance on the federal due process clause to extend individuals' federal confrontation right to state proceedings.

In any event, despite their source, such fundamental societal rights are recognized as limiting individual constitutional rights: "Often the public interest in tranquillity, security, and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. In this case, however, the true nature of the trade-off becomes painfully obvious." (*People ex re. Gallo v. Acuna, supra*, __ Cal.4th at p. ____ [slip opn., p. 4].)

we may protect unimportant witnesses but not crucial ones. We do not draw that lesson from the cases. If limits are to be placed on defendants' constitutional rights, they must be narrowly drawn only to accommodate equally compelling fundamental interests. We think the better rule is that any witness, whether crucial or peripheral, faced with serious threats to his safety, regardless of their source, may be protected by carefully crafted discovery limits, narrowed to permit as much discovery and cross-examination as feasible under the circumstances. Here, given the discovery that has been and will be produced, the trial court properly refused to disclose the witnesses' true identities and photographs. We do not suggest that greater limits could never be acceptable, or that more discovery could never be required. We leave that analysis to different cases presenting different facts. We reluctantly acknowledge that we cannot assure absolute safety to any witness. We insist only that we not indulge ourselves in a game of judicial roulette with witnesses' lives. If the danger is mortal, the overriding consideration is protection of the witness' life.

We conclude the trial court properly exercised its discretion by carefully balancing these fundamental interests. The trial court found that disclosure of these crucial prosecution witnesses' names and likenesses would place them in mortal danger, regardless of the danger's source. That finding is not challenged. We think that discovery limitation, given the wealth of disclosed information, sufficiently narrowly crafted to withstand constitutional scrutiny.

DISPOSITION

We deny the writ petitions, dissolve the previously granted stay, and remand the matter for trial.

CERTIFIED FOR PUBLICATION.

ORTEGA, Acting P.J.

I concur:

VOGEL (Miriam A.), J.

MASTERSON, J., dissenting.

I dissent.

I start, as does the majority, from the basic precept that “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.” (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) “It is the essence of a fair trial that reasonable latitude be given the cross-examiner. . . . Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations.]” (*Alford v. United States* (1931) 282 U.S. 687, 692.)

As the case now stands, defendants are subject to convictions of first degree murder, with Alvarado facing a sentence of death. This can happen based on the testimony of witnesses whose identities have not been disclosed to them or their attorneys. Without doubt, this lack of disclosure places formidable hurdles in the path of an investigation of the memories and perceptions of these witnesses. The main thrust of defendants’ argument to this court, however, is that nondisclosure impermissibly limits their ability to discredit the witnesses by inhibiting defense efforts to collect raw material which might form the basis for impeachment. This, they urge, is of great importance to their defense. The reason is readily apparent.

“Snitching” against the Mexican Mafia appears to be a capital offense in the parallel society that gangs are recognized as having created within this state’s penal institutions. Given the prominence and power of the Mexican Mafia and other established prison gangs, it is a wonder that any inmate would ever come forward to identify the perpetrators of a murder, especially of an alleged snitch. That such witnesses do come forward may speak well of them, as they seem to give society help in bringing culpable parties to justice. But given the culture within which the

homicide in this case was committed, certain questions arise as to why witnesses Nos. 1, 2 and 3 chose to cooperate with law enforcement officials. A sense of duty and respect for human life could be one answer. Animus, group loyalty, or self-interest could be others.

It is possible that the witnesses in this case are members of, affiliated with, or seeking to impress one of the Mexican Mafia's rival gangs. (See *Dawson v. Delaware* (1991) 503 U.S. 159, 165 [evidence that tenets of a prison gang required its members to lie, cheat, steal and kill to protect each other is admissible to show bias]; *People v. Garnica* (1981) 121 Cal.App.3d 727, 730-731 [groups considered inimical to Nuestra Familia, which maintains "hit lists" of enemies, include the Mexican Mafia].) It could also be that the witnesses are unaligned with a prison gang, but nonetheless have a personal score to settle with the defendants. Equally plausible is the possibility that one or more of the witnesses was motivated by the desire to be placed in protective custody so that he could carry out gang activities from within that setting,¹ or that he wanted to be in protective custody because he felt himself in danger for reasons he did not want to disclose, or that he wanted special attention for some unrelated, and perhaps irrational, reason. Any or all of such information would be invaluable to the defense in seeking to discredit the testimony of these witnesses by impugning their credibility.

This need for complete preparation by the defense is underscored by the many vexing questions that arise from the evidence thus far presented. For example, why were misidentifications made from the photographs shown to the witnesses? Why did witnesses Nos. 1 and 2 stay in their cells rather than go to lunch on the day of the killing? Why did only one of them see other inmates with Alvarado and Lopez or hear the shouts of others while Uribe was being killed? Why was witness No. 1 put

¹ Evidence was received in municipal court discovery proceedings that prison gang members often seek to be placed in protective custody in order to accomplish a mission with respect to other inmates who are similarly housed.

in the same cell as Alvarado just before the witness's testimony before the grand jury?

While it is possible that there are innocent explanations for all of these questions, traits of honesty and personal responsibility are not usually the hallmarks of state or local prisoners. Penal institutions are fertile grounds for artifice and deceit. The ability to prove that witnesses Nos. 1, 2 and 3 are deceitful, if evidence to support that position exists, would be a key component of Alvarado's and Lopez's defense. It is inconceivable that such a defense could be adequately developed without knowing the identities of those to be investigated.

The majority pays no more than lip service to this reality. After having acknowledged the existence of this impediment to defense preparation, the majority "emphasize[s]" the limited nature of the information being withheld, i.e., the witnesses' names and photographs. (Maj. opn., *ante*, p. ____ [typed opn. p. 18].) It also seeks to lessen the impact of the information by suggesting that defendants probably know who the witnesses are. The majority cannot have it both ways. The order of nondisclosure is premised on the assumption that defendants are not able to identify the witnesses. If this assumption is incorrect and defendants know the witnesses' identities (a reasonable possibility given the evidence and findings regarding the Mexican Mafia's extensive intelligence network), the order of nondisclosure is of no practical consequence. If, however, defendants do not know who the witnesses are (the assumption that we are bound to accept), the fact that the nondisclosure may be "limited" is of no consequence because, as readily conceded by the majority, even limited nondisclosure will "significantly impair[]" the defendants' ability to present their case to the jury. (*Id.* at p. ____ [typed maj. opn. p. 16].)

The majority recites case law as if there were an almost unbroken line of authority permitting denial of confrontation in order to protect witness safety. I see the law differently. To be sure, "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." (*Coy v. Iowa* (1987) 487 U.S. 1012, 1020.) However, no case has held that confrontation may be denied

where the witnesses are key to the prosecution, there is reason to suspect that factual bases may exist for attacking the credibility of these witnesses, and the denial of confrontation may deprive a defendant of the opportunity to develop such facts. In other words, a case such as this where a defendant's ability to present his case would be, as the majority puts it, "significantly impaired."

Each of the cases cited by the majority in support of the order of nondisclosure is distinguishable. In *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, the trial court conditioned disclosure of the identities of four "civilian" witnesses to a gang murder upon a showing that the credibility of the witnesses was at issue. The defendant did not attempt to make such a showing and the court ultimately denied his request that the witnesses' identities be disclosed. (*Id.* at pp. 771-772.) In *People v. Castro* (1979) 99 Cal.App.3d 191, the court denied the defendant's mid-trial request for the current address of a police informant who testified that he had sold drugs to the defendant. In upholding the order, the *Castro* court noted that denial of a witness's address is improper only where it deprives the defendant of the opportunity to place the witness in his proper setting and test his credibility. (*Id.* at pp. 202-203.) Through cross-examination of the informant and presentation of three of his own witnesses, the defendant in *Castro* was able to place the informant in his proper setting and raise serious questions about his credibility, even without knowing the informant's address. (*Id.* at pp. 203-204; see also *People v. Watson* (1983) 146 Cal.App.3d 12, 20-21 [defendant not deprived of substantial preliminary hearing right when material witness's address not disclosed because other evidence placed witness in his proper setting].)

The federal cases relied on by the majority are similarly distinguishable. (See *Clark v. Ricketts* (9th Cir. 1991) 958 F.2d 851, 854-855 [defense knew prosecution's John Doe witness's true name and criminal record well in advance of trial]; *United States v. Varella* (11th Cir. 1982) 692 F.2d 1352, 1356 [disclosure of identity of informants who were not "integral participants" in the underlying transaction not required]; *United States v. Rangel* (9th Cir. 1991) 534 F.2d 147, 148 [nondisclosure

of informant's name on the ground of witness safety upheld without discussion of informant's importance to the case]; *United States v. Cosby* (9th Cir. 1974) 500 F.2d 405, 407 [same]; *United States v. Ellis* (9th Cir. 1972) 468 F.2d 638, 639 [defendant properly precluded from eliciting correct name, residence and occupation of agent-purchaser of drugs who was of "marginal significance" to the prosecution's case]; *United States v. Jordan* (4th Cir. 1972) 466 F.2d 99, 102 [reversal not warranted where names of eyewitnesses to jailhouse knife attack on another inmate not disclosed because, inter alia, victim positively identified defendant as assailant and defendant's alibi defense debunked by testimony of prison guards]; *United States ex rel. Abbott v. Twomey* (7th Cir. 1972) 460 F.2d 400, 401-402 [informant who was not a principal or chief witness to drug transaction not required to reveal his true identity, residence and place of business].)

The case that the majority claims does not follow the law is *People v. Brandow* (1970) 12 Cal.App.3d 749. There, the defendant was charged with pandering. The main prosecution witness was a former prostitute who was cooperating with the police under an assumed name. The trial court refused to permit the defendant to cross-examine the witness as to her true identity on the ground that such disclosure would put her life in danger. (*Id.* at pp. 751-754.) Citing *Smith v. Illinois* (1968) 390 U.S. 129, the Court of Appeal reversed, finding that witness credibility was the "fulcrum upon which the determination of the defendant's guilt or innocence must be balanced," and that the failure to disclose the witness's true identity thus denied the defendant his right to a fair trial. (*People v. Brandow, supra*, 12 Cal.App.3d at p. 755; see also *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 385.)

Brandow's failing, according to the majority, is that it did not apply a balancing test but rather ruled that where important confrontation rights are at stake the balancing of interests is not permitted. Although *Brandow* is terse in its analysis, I fail to see where it purports to establish an absolute rule. Rather, the *Brandow* court noted that the trial court had "balanc[ed] the defendant's constitutional interests against the protection of the witness' physical safety" (12 Cal.App.3d at p. 754) and

reached its conclusion only after considering “the circumstances” of the case (*id.* at p. 755).²

The majority suggests that the position taken in this dissent would illogical ly protect witnesses who are peripheral to the prosecution case while permitting the safety of important witnesses to be placed in jeopardy. This suggestion demonstrates the failings of the majority’s position. It is true that giving different levels of protection to witnesses who are subject to the same level of danger appears incongruous. However, the majority fails to note that where a witness is peripheral or his credibility is not in issue, the weight on the defendant’s side of the balancing equation is significantly diminished. Thus, it is precisely when competing interests are appropriately balanced that a peripheral witness may be entitled to more protection than a witness who is crucial to the prosecution’s case.

I frankly cannot envision a situation that would warrant permanent nondisclosure where the obstacle it presents to the defense is as severe as exists here. But the procedural context from which the instant order emanated is perhaps responsible for misleading the trial court into thinking it was proper. The order arose from a finding of good cause under Penal Code section 1054.7, a statute that is part of Proposition 115’s “pretrial discovery” scheme. (See Pen. Code, § 1054.) Under

² The majority speaks of the proper balance as one to be achieved by weighing “criminal defendants’ constitutional rights against society’s fundamental right to fair trials. . . .” (Maj. opn., *ante*, p. ____ [typed opn. p. 26].) To the extent this characterization implies a constitutional “right” on the part of the People, it is misleading. In analogous situations, the balancing equation has been described in a number of ways that recognize society’s interests. (E.g., *People v. Zapien* (1993) 4 Cal.4th 929, 975 [“the defendant’s right to effective cross-examination against the public’s interest in effective prosecution”]; *People v. Hobbs* (1994) 7 Cal.4th 948, 957 [“the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant’s right of reasonable access to information upon which to base a challenge to the legality of a search warrant”].) However, there is no federal constitutional provision on which these expressions of society’s interests rely, nor do the recently adopted California People’s rights to due process of law and to speedy and public trials (Cal. Const., art. I, §29) appear to address this issue.

this provision, the trial court found that the witnesses “are in serious danger as a result of their participation in this case and that the disclosure of their names would likely increase the danger to them.” I see the thornier question as being whether the trial court’s finding might justify the withholding of the witnesses’ identities as part of pretrial discovery. However, the quantum of danger found here would not distinguish this situation from myriad other cases and thus appears inadequate to justify the *permanent* nondisclosure that the trial court ordered.³

I close by referencing the majority’s statement that I have chosen by this dissent to “elevate procedure over the witnesses’ welfare.” (Maj. opn., *ante*, p. ____ [typed opn. p. 2].) The statement is colorful but inaccurate. I have tried to make it clear in the foregoing that what I advocate is not a *procedure* but rather an adherence to a *process* which has served us well for generations.

Probably the greatest strength we have as a society is our ability to overcome the real or perceived threat du jour, whether it be organized crime in the ‘30’s, claims of internal subversion in the ‘50’s, or terrorism and militia groups in the ‘90’s. We survive these by dealing with them within the framework of our democratic institutions, not the least of which are those guarantees of a fair trial that I see damaged by the majority opinion. Of course the temptation is ever present to abridge these guarantees when faced, as the majority puts it, with “forces of social disintegration and anarchy.” (*Id.* at p. ____ [typed maj. opn. p. 19].) The dangers to the witnesses in this case and in many other cases are real. But as a society we have survived much, and we will surely survive the threat posed by the gang activity of

³ It also bears mention that, in addition to trying to dissuade adverse witnesses from testifying, it is also part of the Mexican Mafia’s arsenal to retaliate against such witnesses once their testimony has been given. Here, although the likelihood that the People will be able to bring this case to trial may be enhanced by the order of nondisclosure, once the witnesses have appeared in open court and thereby been subjected to the scrutiny of the Mexican Mafia’s extensive intelligence network, what protection the nondisclosure order previously afforded could well be rendered meaningless.

today. The greater danger is if we overreact and accept an abridgment of liberty foreign to our history and tradition. For if we do that, we shall harm ourselves more than any gang or group of gangs ever could.

MASTERSON, J.